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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 389

STATE OF FLORIDA, ON RELATION OF HICKS-KESSLER FLYING SCHOOL, INCORPORATED, A FOREIGN CORPORATION, *Petitioner,*

vs.

GEORGE E. HOLT, AS JUDGE OF THE CIRCUIT COURT, IN AND FOR THE ELEVENTH JUDICIAL CIRCUIT, DADE COUNTY, FLORIDA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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State of Florida, on Relation of Hicks-Kessler Flying School, Incorporated, a corporation of the State of Virginia, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida, entered in the above entitled case on August 21, 1951, and the order of said Court denying rehearing, entered on September 5, 1951 (R. 31-35).

Opinions Below

The lower Courts did not prepare opinions. The order of the respondent, Honorable George E. Holt, Judge of the Circuit Court of Dade County, Florida, denying relator-petitioner's motion to quash purported service was entered

on June 28, 1951 (R. 26, 27). The order of the Supreme Court of Florida denying the petition for issuance of writ of prohibition, entered on August 21, 1951 (R. 31), and the order denying rehearing, entered on September 5, 1951 (R. 35) were upon unreported memoranda.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1251(1), and Rule 12(1), third paragraph. The relator-petitioner has entered a special appearance in the Circuit Court (R. 16). It has removed the case to the Federal Court (R. 17). It has filed in the Federal Court a motion to quash the purported service, denominated a motion to dismiss (R. 23). The United States District Court has remanded the case to the State Court (R. 22). The relator-petitioner has not filed any papers or pleadings in the Circuit Court (except the special appearance referred to), but has argued the motion to quash, filed as a motion to dismiss under Rule 12(b) in the Federal Court. Upon denial by the Circuit Judge of the motion to quash (R. 26), relator-petitioner filed in the Supreme Court of Florida its petition, or suggestion, for writ of prohibition, against the Circuit Judge (R. 27), to prevent the unlawful exercise of jurisdiction over petitioner. Order denying the application for writ of prohibition was entered by the Florida Supreme Court (R. 31). Petition for rehearing was filed (R. 33) but it was denied. Application for stay order was also denied by the Florida Supreme Court but stay was granted under order issued by a Justice of the United States Supreme Court on October 4, 1951.

The application to the Florida Supreme Court (the highest Court of the State), for prohibition, was an original proceeding coming within its supervisory jurisdiction. It is thought that the fact that the said proceeding related

to a now pending law suit in the Circuit Court of Dade County, Florida, does not deprive the judgment denying the prayer for prohibition of its finality, although the primary litigation has not ended. The cases relied upon, as to the foregoing, are *Pacific Coast Dairy* v. *Department of Agriculture*, 318 U. S. 285, 87 L. Ed. 1508, 63 S. Ct. 628, and *Betts* v. *Brady*, 316 U. S. 455, 460-61, 86 L. Ed. 1595, 62 S. Ct. 1252.

Question Presented

The question presented is whether relator-petitioner, a corporation of Virginia, not present in Florida but sued there, together with several other alleged tort-feasors, upon removing the action to the United States District Court on ground of diversity and, for want of constitutionally guaranteed due process, to move to quash and dismiss summons and complaint wherein summons was alleged to have been constructively served, was, after remand, properly held to have waived service of process and to have submitted its person to jurisdiction of State Court, where only pleadings filed in State Court were special appearance and notice of removal and only pleading filed in Federal Court was appropriate to present jurisdictional question, without waiver, being a motion to quash and dismiss.

Statement

An action was filed by Ruth Reese, for the alleged wrongful death of her husband, against relator-petitioner and several others, in the Circuit Court of Dade County, on November 3, 1950 (R. 1). The death was caused by an airplane collision in the air spaces above Sunny South Airport, in Miami. Relator-petitioner, a corporation of Virginia, was charged with responsibility on the basis of being the alleged owner of a Cessna airplane, involved in the collision, which it had "entrusted" or had "rented" either to

one Farries or one Hodges, "for its operation". The so-called Licensed Dangerous Instrumentality Rule was sought to be invoked as a basis for the alleged liability.

On November 7, 1950, there was filed in said Circuit Court a certificate of the Secretary of State of Florida to the effect that he had been served with a copy of the summons and complaint, on behalf of relator-petitioner, under the Nonresident Motor Vehicle Act of Florida (R. 7). This was accompanied by an affidavit of service on the nonresident (R. 8) and notice of service (R. 10). A registered return receipt (R. 13) was also filed.

Thereupon, relator-petitioner filed in said Circuit Court a special appearance (R. 16) for the sole purpose of testing the jurisdiction and for removal of the cause to the Federal Court. Such removal was effected (R. 17) and petitioner filed in the Federal Court its motion to dismiss, presenting defenses of failure to state a claim, of lack of service of process, of improper venue, and of lack of jurisdiction under Rule 12(b), said motion having been filed on November 20, 1950 (R. 24). However, the Federal Court remanded the case (R. 22) on December 28, 1950, without passing upon the motion to quash.

A certified copy of the motion of relator-petitioner, last referred to, was sent down from the Federal Court to the Circuit Court, subsequently, but no other or further pleading was required, or filed, on its behalf. Said motion was then brought on for hearing, without more, at which hearing relator-petitioner contested the purported service of process and continued to deny the Court's jurisdiction over its person. Nevertheless, the Circuit Judge denied the motion (R. 26) and petitioner being without other remedy in the premises, invoked the jurisdiction of the Florida Supreme Court in an original jurisdiction proceeding by way of suggestion for writ of prohibition (R. 27). And as above

noted, the petition for writ of prohibition was denied (R. 31) and the petition for rehearing in connection therewith was also denied (R. 35).

Specification of Errors to Be Urged

The Supreme Court of Florida erred:

1. In denying petitioner's application for writ of prohibition against the Judge of the Circuit Court of Dade County, to prohibit the attempted exercise of unlawful jurisdiction over the person of petitioner, as a nonresident defendant, contrary to due process of law.

2. In holding that Florida Rules of Practice apply to a defendant's pleading, filed in a Federal Court, upon remand, so as to confer jurisdiction, by submission, over the person, where such jurisdiction had not attached.

3. In affirming, or sanctioning, the order of the Circuit Court of Dade County, hereinabove described.

The Circuit Court of Dade County, Florida, erred:

1. In denying petitioner's motion to quash the purported substituted service of process upon petitioner, a Virginia corporation not present or doing business in Florida.

2. In holding that the Florida Nonresident Motorist Statute, Sections 47.29 and 47.30, Florida Statutes, is applicable to a person living in another and distant state, who is the owner of an airplane.

3. In holding that a defendant, in filing in a Federal Court, pursuant to the Federal Rules of Civil Procedure, a motion to dismiss, presenting defenses of failure to state a claim, of lack of service of process, of improper venue and of lack of jurisdiction under Rule 12(b) has, upon a remand of the case to the State Court, submitted to the jurisdiction of the State Court by reason of the filing of said pleading in the Federal Court, wtihout more.

The petitioner says, further, that with respect to each of the said assignments, the Court proceeded in a manner violative of the guarantee of the provisions of the Constitution of the United States, and of the Fourteenth Amendment thereto, in depriving petitioner of due process of law.

Reasons for Granting the Writ

1. It is entirely clear that the petitioner, as defendant, did not appear either in the Circuit Court of Dade County or in the United States District Court for the purpose of trying the case on the merits, but did appear for the purpose of setting aside the process and raising jurisdictional questions pursuant to the Federal Rules of Civil Procedure, Rule 12(b).

2. A foreign corporation does not waive invalidity of an attempted service of process on it by a State Court through petitioning for a removal of the cause to the Federal Court. *General Investment Co.* v. *Lake Shore R. Co.*, 260 U. S. 261, 67 L. Ed. 244, 43 S. Ct. 106.

3. At each stage of the proceeding, petitioner has challenged appropriately, and has denied, that it has been served validly with process in the case. See special appearance filed in Circuit Court (R. 16); also, paragraph 7 of petition for removal (R. 18, 19), laying predicate for question in Federal Court as to whether purported service amounted to "due process"; also, the second, third, fourth, fifth, sixth, seventh, eighth, ninth and tenth numbered paragraphs of defendant's motion, filed in the Federal Court (R. 24, 25) to quash the purported service and dismiss the action. When all of the actions taken, and procedures resorted to by a party defendant have been by way of authorized frontal attack upon the purported service of the process, and by way of denial of the Court's jurisdiction, it cannot properly be said that such party has "voluntarily" subjected itself to

the jurisdiction of the Court. See *General Investment Co.* v. *Lake Shore R. Co., supra.*

4. While the case was improperly remanded by the United States District Court for the Southern District of Florida, Miami Division, to the Circuit Court of Dade County, the error thereby committed is not subject to being corrected in this proceeding. Nevertheless, the record affirmatively discloses that the question as to service of process, and due process, was presented to the Federal Court appropriately, and in strict conformity with Rule 12(b) of the Rules of Civil Procedure. The Federal Court failed and refused to decide the question so presented, and remanded the case to the State Court, but in so doing, it did not confer, and could not confer, upon the State Court the right to hold that in raising the question in due form of law, and under appropriate procedure, petitioner had "waived" the question and had voluntarily submitted itself to the Court, in such manner that the Court had jurisdiction over its person.

5. After the remand, petitioner, as to the filing of any other or further pleadings on its behalf, was bound by the Florida Common Law Rules of Procedure (effective January 1, 1950). Under Rule 13(b) thereof (copied in appendix) it was too late for petitioner to interpose a motion in the Circuit Court of Dade County to quash the purported service or to challenge the jurisdiction of the Circuit Court over its person. The stated rule requires that every question or defense based upon "lack of jurisdiction over the person", or "insufficiency of process" or "insufficiency of service of process" must be asserted by motion interposed within ten (10) days from the service of process, otherwise such question is waived. Accordingly, petitioner could, at the time of the remand, and afterward, enter no pleading whatever in the State Court without appearing generally and waiving the questions as to jurisdiction and service of

process. However, it was not held that petitioner was in default, but it was held that petitioner, through its pleading filed in the Federal Court prior to remand, had waived the questions as to jurisdiction and service of process. This, we submit, was error, and was contrary to due process of law. In the case of *Ayres* v. *Wiswall*, 112 U. S. 187, 28 L. Ed. 693, 5 S. Ct. 90, at page 92, answer had been filed in the United States Circuit Court and the case was subsequently remanded. Chief Justice Waite said:

> "The fact that Ebenzer R. Ayres had filed his answer in the United States Court is a matter of no importance. That fact did not of itself confer jurisdiction if there had been none before."

It is submitted that the rulings both of the Circuit Court of Dade County, Florida, and of the Supreme Court of Florida with respect to this petitioner's "voluntary" appearance, and waiver of the questions as to service of process and jurisdiction, and as to its submission, are erroneous, and contrary to due process of law.

6. The Nonresident Motorists Substituted Service Act of Florida (Sections 47.29 and 47.30, as amended, Florida Statutes), (copied in appendix), is based upon a hypothetical agency relationship. The Secretary of State of Florida theoretically becomes the agent of a nonresident motorist for the acceptance of the service of process when such motorist avails himself of the privilege of using the public highway of the state. As the statute imposes a contractual obligation in derogation of common law, and affects substantial rights, it cannot be extended by implication to include persons who do not come within its terms, but instead the statute must be strictly construed. *Wood* v. *White*, 97 F. 2d 646, 68 App. D. C. 341, certiorari denied *White* v. *Wood*, 304 U. S. 578, 82 L. Ed. 1541, 58 S. Ct. 1048.

The test of the applicability of the mentioned statute

was stated in *Ex Rel. Penick & Ford* v. *Civil Court of Record of Duval County,* 126 Fla. 550, 127 Fla. 331, 171 So. 516 (1936), as follows:

> "The test of applicability of Chapter 17254, supra (Laws 1935, set out in Sections 47.29 to 47.32), is the nonresidence of the motor vehicle owner. Where nonresidence is alleged or established, the operation of motor vehicles in the State of Florida, by or under the nonresident owner thereof, is to be deemed an acceptance by such nonresident of the privilege of using the roads of Florida only upon condition of the nonresident's acceptance of Chapter 17254, Acts 1935, as incident to such use of Florida roads."

The Federal Government, through the Civil Aeronautics Authority, controls Aeronautics over the entire nation. The Air Commerce Act of 1926 and the Civil Aeronautics Act of 1938, gave to the United States complete exclusive national sovereignty in the air space over this country. Use of such air space is not, we submit, tantamount to the acceptance of an invitation to use the public highways of the State of Florida in such manner as to permit the imposition of a contractual obligation in derogation of common law. As we see it, no such obligation has been imposed, or attempted, and the existing law cannot, we submit, be extended by implication in such manner as to be made applicable to aircraft.

The Florida statute, above mentioned, is silent as to substituted service upon a nonresident owner of aircraft. Justification for the decisions of the Courts below would require reading into the statute matter not contained therein.[1]

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[1] It is suggested that Minnesota has enacted legislation providing that the operation of an aircraft within the state by a nonresident, or his agent, shall be deemed an appointment of the Minnesota Commissioner of Aeronautics as the attorney for such nonresident for the service of process

The Florida Statutes are replete with definitions of the words "motor vehicle" to refute any possible argument on the part of the respondent, that an aircraft is a motor vehicle designed for use upon the public highways of this state, and therefore, was included within the intent of the Nonresident Motorists Substituted Service Act, *supra.* In Section 317.01, Laws of Florida, 1941, Section 11, a motor vehicle is defined as follows:

> "Every vehicle which is self-propelled and every vehicle which is propelled by electric power obtained from overhead trolley wires, but not operated upon rails."

In subsection 28 of the same section of the statute, the word "vehicle" is defined as follows:

> "Every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, except devices moved by human power or used exclusively upon stationary rails or tracks."

In Section 317.74, Laws of Florida 1939, Subsections 1 and 2, the same definitions of "motor vehicle" and "vehicle" appear as quoted above, and form the basic definitions for the Florida Motor Vehicle Safety Law incorporated within Chapter 317, Subsection .73 *et seq.*, Laws of Florida 1949. Also in Section 320.01, Laws of Florida 1941, being a part of the Florida Motor Vehicle License Law, Subsection 1 defines "motor vehicle" as follows:

> "Motor vehicle includes automobiles, motorcycles, motor trucks and all other vehicles operated over the public highways and streets of this state and propelled by power other than muscular power, but does not

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in any action growing out of such operation. We refrain from discussing such legislation, for the reason that this law has not been enacted in Florida and detailed discussion of it here would be manifestly out of place.

include traction engines, road rollers, and such vehicles as run only upon a track."

In Florida's New Financial Responsibility Law, Chapter 324, Laws of Florida, 1947, and 1949, in Section 324.01, Subsection 1, a "motor vehicle" is defined as follows:

> "Motor vehicle—every self-propelled vehicle which is designed for use upon a highway, including trailers and semi-trailers designed for use with such vehicles (except traction engines, road rollers, farm tractors, tractor cranes, power shovels, and well drillers) and every vehicle which is propelled by electric power obtained from overhead wires but not operated upon rails."

The term "motor vehicle" has always connoted a device designed for operation upon the public highways. All of our statutes appertaining to the use of automobiles, define a motor vehicle as such.

The leading Federal case seems to be *McBoyle* v. *U. S.*, 75 L. Ed. 817, 283 U. S. 25, 165 A. L. R. 916, wherein Mr. Justice Holmes, in writing the opinion of the Court, held that the term "motor vehicle" as used in the National Motor Vehicle Theft Act, was not broad enough to include aircraft. The Court reasoned that the question involved in the case was the meaning of the word "vehicle", in the phrase "any other self-propelled vehicle not designed for running on rails." The Court remarked that airplanes were well known when the statute was passed, and that while etymologically it would be possible to use the word to include an airplane, in everyday speech "vehicle" calls to mind the picture of a thing moving on land.

7. In the case at bar, the Florida Supreme Court has not held that the attempted substituted service was valid or that petitioner, an absent Virginia corporation, could in any event be served by reason of ownership of an airplane,

under the Florida Nonresident Motorist Act. It has evaded the question by saying that petitioner "submitted itself to the jurisdiction of the Court" (R. 31), as above stated. In the case of *Cherry* v. *Heffernan*, as Judge of the Civil Court of Record of Dade County, 132 Fla. 386, 182 So. 427 (1938), the same Court suggested (bottom of page 429) that if no other basis could be found to hold service on a nonresident sufficient, when such a defendant comes into the Florida Supreme Court with a petition for prohibition (original jurisdiction) that will be held as a general appearance in the primary lawsuit. However, we need cite no authority for the proposition that a decision of a Florida Court is not binding upon this Court in determining whether attempted substituted service is in accordance with due process and as to whether a motion to quash under Rule 12(b) in a Federal Court is a voluntary general appearance.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted. A transcript of the record of the proceedings in the Circuit Court of Dade County has been lodged in and is held by the Supreme Court of Florida. Petitioner submits, accordingly, that the writ may be addressed to the Supreme Court of Florida, but prays, in the alternative, that the writ may be issued to both of said State Courts, jointly or in the alternative, as may appear meet.

Respectfully submitted,

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APPENDIX

The following is an excerpt from the Florida Common Law Rules of Procedure, adopted by the Supreme Court of Florida, on November 22, 1949, and effective on January 1, 1950:

A. RULE 13. DEFENSES:

(a) . . .

(b) How Presented. Every defense in law or in fact to a cause of action or claim for relief in any pleading, whether original claim, counterclaim or cross-claim, shall be asserted in the responsive pleading thereto, if one is required; except that the following claims or defenses may at the option of the pleader be made by motion to dismiss: (1) lack of jurisdiction over the subject matter; (2) lack of jurisdiction over the person; (3) improper venue; (4) insufficiency of process; (5) insufficiency of service of process; (6) failure to state a claim or defense upon which relief can be granted; (7) failure to join indispensable parties. By filing a motion to dismiss on the sole ground of lack of jurisdiction over the person, or insufficiency of process or service of process, the movant, in the event the motion is granted, shall not be deemed by filing and arguing the motion to have submitted himself to the general jurisdiction of the court. A motion raising any of these defenses shall be made within 10 days from the service of a copy of the complaint, counterclaim or cross-claim, or (except as to defenses 2, 4, and 5) such defenses may be included in the answer or other pleading when it is filed. Except as to defenses 2, 4, and 5, no defense shall be deemed waived by reason of its being joined with one or more other defenses or objections in a responsive pleading or motion.

The following excerpts are from the Florida Statutes containing the Florida Nonresident Motorists Substituted Service Law. Section 47.29, as amended, is as follows:

B. 47.29. Service of Process upon Nonresident Motor Vehicle Owners, etc.:

(1) Any nonresident of this state, being the operator or owner of any motor vehicle, who shall accept the privilege extended by the laws of this state to nonresident operators and owners, of operating a motor vehicle or of having the same operated, or permitting any motor vehicle owned, or leased, or controlled by them to be operated with their knowledge, permission, acquiescence or consent, within the State of Florida, or any resident of this state, being the licensed operator or owner of or the lessee, or otherwise entitled to control any motor vehicle under the laws of this state, who shall subsequently become a nonresident or shall conceal his whereabouts, shall, by such acceptance or licensure, as the case may be, and by the operation of such motor vehicle, either in person, or by or through his, her, or its servants, agent, or employee, or by person with his, her or its knowledge, acquiescence and consent, within the state of Florida make and constitute the secretary of State of Florida, his, her, its or their agent for the service of process in any civil suit or proceeding instituted in the courts of the State of Florida against such operator or owner, lessee or other person entitled to control of such motor vehicle, arising out of or by reason of any accident or collision occurring within the state in which such motor vehicle is involved.

(2) If any person upon whom service of process is authorized to subsection (1) shall die, service shall be made upon his administrator, executor, curator or personal representative in the manner prescribed by Section 47.30. As amended Laws 1949, c. 25003, Subsections 1, 2.

47.30. Method of Service upon Nonresident:

Service of such process shall be made by leaving a copy of the process with a fee of two dollars in the hands of the secretary of state, or in his office, and such service shall be sufficient service upon a defendant who has appointed the secretary of state as his agent, for the service of such process; provided, that notice of such service and a copy of the process are forthwith sent by registered mail by the plaintiff, or his attorney, to the defendant, and the defendant's return receipt and the affidavit of the plaintiff, or his attorney, of compliance herewith are filed with the papers in the case on or before the return day of the process or within such further time as the court may allow, or that such notice and copy are served upon the defendant, if found within the state, by an officer duly qualified to serve legal process, or, if found without the state, by a sheriff or deputy sheriff of any county of this state or by any duly constituted public officer qualified to serve like process in the state or jurisdiction where the defendant is found; and the officer's return showing such service to have been made is filed in the case on or before the return day of the process or within such further time as the court may allow.